



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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April 4, 2023

VIA E-MAIL

Shonda D. Green, Secretary
Department of Telecommunications & Cable
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RE: D.T.C. 22-4 – CRC Communications LLC d/b/a OTELCO v. Massachusetts Electric Company and Verizon New England Inc.

Dear Secretary Green:

On February 21, 2023, CRC Communications LLC d/b/a OTELCO (“OTELCO” or “Company”) submitted a Motion for Enforcement (“Motion”) of the final Order issued on October 11, 2022, by the Department of Telecommunications and Cable (“DTC”) in the above-captioned matter. On March 21, 2023, the Hearing Officer established an April 4, 2023 deadline for parties to respond to the Motion. As an intervenor and formerly combined agency that shares oversight and jurisdiction of pole attachments and precedential authority with the DTC, the Department of Public Utilities (“DPU”) offers the following comments. As discussed below and upon review of OTELCO’s Motion, the DPU recommends that the DTC deny the Motion.

Pursuant to our shared pole attachment regulations, 220 CMR 45.01, “[t]he general procedural rules set forth at 220 CMR 1.00 [. . .] and 220 CMR 1.00 [. . .] are also applicable....” Therefore, in this instance, the procedural rules set forth in 207 CMR 1.00 et seq. guide the DTC’s resolution of the Motion. See D.T.C. 22-4, Hearing Officer Notice at 1-2 (May 20, 2022); see also Comcast of Massachusetts v. Peabody Municipal Light Plant

and Peabody Municipal Lighting Commission, D.T.C. 14-2, Hearing Officer Order on Motion for Reconsideration at 1 (2014).¹ The DTC's procedural regulations, similar to the DPU's, identify three types of motions that may be filed by the parties after the issuance of a final order by the agency: (1) recalculation; (2) reconsideration; and (3) extension of the judicial appeal period. 207 CMR 1.10(9)-(11); 220 CMR 1.11(9)-(12).² Here, in the guise of an enforcement request, the Company has effectively submitted either (1) a late-filed motion for reconsideration or clarification that seeks to both relitigate several issues already decided by the DTC and improperly expand the scope of the proceeding after the record has closed; or (2) a new complaint based on OTELCO's interpretation of the DTC's Order.

The DTC's procedural rule, 207 CMR 1.10(10), authorizes a party to file a motion for reconsideration within 20 days of service of a final order. The policy on reconsideration of DTC Orders is well-settled. See, e.g., Petition of Verizon New England for Arbitration of Interconnection Agreements, D.T.C./D.T.E. 04-33-D at 3 (2007); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1981). Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that the agency take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. Verizon Massachusetts Annual Lifeline Verification, D.T.C. 11-19, Order on Motion to Reconsider and Vacate Order and Close Docket and on Motion for Extension of Judicial Appeal Period at 2 (2012); D.T.C./D.T.E. 04-33-D at 3; Western Massachusetts Electric Company, D.T.E. 00-110-C, at 9 (2001); Fitchburg Gas and Electric Light Company, D.T.E. 98-51-A, at 5-6 (1999); North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); D.P.U. 90-270-A at 3. Extraordinary circumstances warranting reconsideration include previously unknown or undisclosed facts that would have significant impact upon the

¹ Our agencies shared the same procedural regulations until 2017. See Rulemaking and Regulation Review Pursuant to G.L. c. 30A, 207 CMR 2.00, 220 CMR 2.00, and Executive Order 562, D.T.C. 16-1, at 1-2, 27 (2017). Additionally, our agencies share the same precedent prior to the reorganization that took place in 2007. See 2007 Mass. Acts 19.

² The DPU's regulations identify a fourth permissible post-order motion involving motions for clarification. 220 CMR 1.11(11); see Rulemaking pursuant to G.L. c. 30A, § 2; 220 CMR 2.00 et seq.; and Executive Order 562 to amend or rescind 220 CMR 1.00, 2.00, 5.00, 6.00, 9.00, 11.00, 14.00, 30.00, 77.00, and 79.00, D.P.U. 15-183-A at 19 (2016). A final order of either the DTC or DPU remains in effect when a party files one of these motions and during the pendency of a judicial appeal. G.L. c. 25, § 5; G.L. c. 30A, § 14(3); New England Telephone and Telegraph Company, D.T.E. 98-57, at 8 (June 2, 2000); Appeal of Robert K.M. Lynch, D.P.U. 88-203-A at 5 (1990).

decision already rendered and are newly brought to light, or whether an issue was wrongly decided due to the agency's mistake or inadvertence. D.P.U. 90-270-A at 2-3; Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2, 25-26 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

A motion for reconsideration should not attempt to reargue issues considered and decided in the main case. See, e.g., Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); D.P.U. 90-270-A at 2-3, 7-9; D.P.U. 1350-A at 4-5. The agency has denied reconsideration where the request rests upon information that could have been provided during the course of the proceeding and before issuance of the final Order. See, e.g., Boston Gas Company, D.P.U. 96-50-C (Phase I) at 36-37 (1997); Boston Gas Company, D.P.U. 96-50-B (Phase I) at 8 (1997). The agency has stated that the record in a proceeding closes, at the latest, when an Order is issued. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987). Thus, the DTC may deny reconsideration when the request rests on a new issue or updated information presented for the first time in the motion for reconsideration. See, e.g., D.P.U. 85-270-C at 18-20.

As observed by the DTC, OTELCO made a general claim for boxing in its initial complaint. D.T.C. 22-4, at 13, 23. The DTC denied this general request, instead reviewing pole-specific boxing denials for 14 poles identified in the record. D.T.C. 22-4, at 13-22. As a result of this review, the DTC instructed Massachusetts Electric Company d/b/a National Grid ("National Grid") and Verizon New England ("Verizon") to give specific reasons for boxing denials on only four utility poles identified in the complaint. D.T.C. 22-4, at 21. Additionally, the DTC declined OTELCO's requests to require the performance of preconstruction surveys and engineering within 45 days or to require performance of make-ready work in commercially reasonable timeframes, because the Company did not identify these requests in the complaint but, rather, in its reply brief. D.T.C. 22-4, at 47-49. The DTC also acknowledged that our agencies have to date refrained from establishing a deemed-granted system if attachment denials are not issued within 45 days. D.T.C. 22-4, at 7, 48.

Through its Motion, submitted several months after the 20-day filing deadline, OTELCO improperly seeks to reargue issues already decided by the DTC in this proceeding and raises new issues for the first time. In particular, OTELCO now identifies new requests to box on approximately 1,800 poles as a result of the DTC's findings, instead of the four at issue, and again urges the DTC to mandate certain timeframes for National Grid and Verizon to act on the request via preconstruction surveys and final decisions on the boxing requests (Motion at 7, 36-37). OTELCO also requests that the DTC permit deemed-granted determinations and self-help remedies for attachment and boxing requests in the event that National Grid and Verizon fail to comply with the deadlines proposed by the Company (Motion at 36-39). These issues are simply not appropriate for a post-Order motion in this

proceeding, nor has OTELCO identified any extraordinary circumstances warranting reconsideration or a reopening of the record.

Moreover, inherent in OTELCO's Motion is a new complaint beyond the scope of the instant proceeding. OTELCO claims that National Grid and Verizon are being unjust and unreasonable in how they are implementing the new policy framework for boxing utility poles in the Commonwealth as effectively established by the DTC in its final Order (Motion at 21-28). See D.T.C. 22-4, at 13-14, 18-21.³ Although National Grid and Verizon, to date, have not generally permitted boxing on their poles, they must now address requests to box on a pole-specific basis, and any boxing denials must include specific safety, reliability, or generally applicable engineering reasons. D.T.C. 22-4, at 13-14, 21-22. At the time of the final Order, the DTC noted that OTELCO identified 14 specific poles for which the pole owners refused the request to box and, further, determined that due to the small number of poles that OTELCO sought to box at the time, the general additional burden on the network caused by boxing would be de minimis. D.T.C. 22-4, at 13-14, 17, 19; see also Motion at 5. However, through its Motion and supporting documentation, OTELCO makes clear that it now currently seeks to box at least 1,800 poles, of which 732 are jointly-owned by Verizon, within a 45 to 60 day period (Motion at 7, 36; Declaration of David Allen, ¶ 10) – hardly a de minimis amount. The amount is not de minimis when the timeframe requested and electric distribution companies' ("EDCs") need to direct and plan resources for more immediate safety and reliability concerns such as storm and outage restoration activities and routine vegetation management throughout the state are considered. The significance of this request comes into focus when considering that Verizon and EDCs must now address similar boxing requests to the extent that they are made on the more than 1.4 million utility poles in the Commonwealth (see Exhs. DPU-NG 1-2(b); DPU-NG 1-5; OT-NG 1-1; OT-VZ 1-1).⁴

Implementation of regulatory-mandated revisions to long-established practices can take time and additional resources, with corresponding costs that cannot immediately be quantified and may be passed onto electric and telephone ratepayers (see Exhs. DTC-NG 1-32; DPU-NG 1-5; DPU-VZ 1-5). Thus, it would be unreasonable to establish arbitrary timelines or permit self-help remedies by OTELCO or other attachers without a more comprehensive proceeding involving a broader range of interested parties. Further, the Commonwealth's

³ Although the DTC states that its Order is limited to the parties and facts in the instant proceeding and reviews boxing denials on a pole-specific basis (D.T.C. 22-4, at 4, 13-14, 18-19, 21), the DPU respectfully observes that the Order has precedential value that may be more broadly applied in the future.

⁴ In its initial complaint, OTELCO also noted that the pole applications it had submitted to date to National Grid and Verizon represented approximately only 153 of the more than 1,000 route-miles of its planned network (Complaint at 2, 10 & ¶ 19).

pole attachment statute mandates that our agencies consider not only the interests of cable television and wireless subscribers but also utility consumers. G.L. c. 166, § 25A. For utility subscribers of EDCs like National Grid, the DPU and EDCs are obligated to prioritize and consider the safety, security, reliability, and affordability of service on the electric distribution network. See G.L. c. 164, § 1A. These considerations weigh heavily against the request of OTELCO to expand broadband service in the way it sees fit. Boxing and alternative methods of placing broadband infrastructure on poles are not identified in the Commonwealth's pole attachment statute and, further, state and federal law prohibit rate, service quality, and other utility-style regulation of broadband services. See G.L. c. 25C, § 6A; G.L. c. 166, § 25A; 47 USC § 153(24); Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 312, 318-419, 426-432 (2017), *aff'd in part and remanded in part*, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019), *on remand*, Order on Remand, 35 FCC Rcd 12328 (2020), *ptns. for recon. pending*. Therefore, a more comprehensive proceeding with a broader range of interests is necessary to adjust to new practices and discuss cost recovery and timing.

Accordingly, for these reasons, the Motion should be denied. The DPU appreciates the opportunity to provide these comments and the DTC's consideration. If you have any questions regarding this filing, please contact me at kerri.phillips@mass.gov.

Respectfully submitted,

/s/ Kerri DeYoung Phillips
Kerri DeYoung Phillips, Esq.
Department of Public Utilities

Enc.

cc: Service List (e-mail only)

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

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Massachusetts Electric Company d/b/a National
Grid and Verizon New England Inc.

D.T.C. 22-4

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served the attached comments of the Department of Public Utilities upon the Service List for the above-captioned proceeding, in accordance with the requirements of 207 CMR 1.05.

Respectfully submitted,

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Dated: April 4, 2023